

Introduction to the American Political Process

Class 12: The Judiciary

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1. Readings

Segal and Spaeth, “The Supreme Court and the Attitudinal Model Revisited”

Rosenberg, “The Hollow Hope”

Readings

Bush v. Gore



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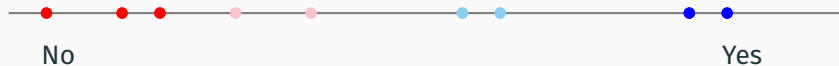
Bush v. Gore

Case hinged on **Equal Protection Clause/Fourteenth Amendment**: everyone entitled to have their vote counted the same way

Majority ruling:

- To manually count every vote in reasonable time would be infeasible
- To take too long on recount would challenge democratic legitimacy
- Therefore, there should be no recount

Ideological spectrum: How feasible is a fair manual recount?



*“The authoritative character of judicial decisions results **because judges make policy**. This statement may have once appeared heretical—as well as demeaning to judges—because it conflicts with the unsophisticated view that judges are objective, dispassionate, and impartial in their decision making. But the Warren Court’s liberal activism, followed not long after by the Rehnquist Court’s conservative activism (topped off by *Bush v. Gore*) certainly must have dampened the remaining remnants of such a notion.”*

Reasons for judicial policymaking:

1. Fundamental law
2. Distrust of governmental power
3. Federalism
4. Separation of powers
5. Judicial review

As always, we seek several features of a model:

1. Explanatory power
2. Parsimony
3. Falsifiability
 - “All models are wrong. Some models are useful.” (Box)

The Legal Model

“The decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of the statutes and the Constitution, the intent of the framers, and/or precedent.”

- Earlier cases exert a “gravitational force” on judges; their goal is to **find** rather than **make** the “correct answer” (Dworkin)
- Legal positivism: “in an attempt to adhere to the law as an empirical fact, a positivist jurist limits his or her interpretation of the Constitution to the meaning of the words or the text or intent of its authors.”

Segal, Jeffrey A., and Harold J. Spaeth. “Models of Decision Making: The Legal Model.” Chapter 2 in *The Supreme Court and the Attitudinal Model Revisited*. Cambridge University Press, 2002. © Cambridge University Press. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

Problem: **falsifiability**

Both sides usually have precedent and some reading of the law on their side.

“By being able to “explain” everything, in the end it explains nothing.”

Segal, Jeffrey A., and Harold J. Spaeth. “Models of Decision Making: The Attitudinal and Rational Choice Models.” Chapter 3 in *The Supreme Court and the Attitudinal Model Revisited*. Cambridge University Press, 2002. © Cambridge University Press. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

The Attitudinal Model and the Rational Choice Model

The attitudinal model:

- Judges have **ideologies** and **goals**
- Judges **control their docket**, only selecting cases that are not obviously clear (and where they can exert influence)
- They do so unconstrained by electoral incentives

The rational choice model:

- Actors are able to order their alternative goals, values, tastes and strategies
- Judges choose from available alternatives so as to maximize their satisfaction

Rosenberg, “The Hollow Hope”

“Are courts effective producers of change... or do their decisions do little more than point the way to a brighter, but perhaps unattainable future?”

Even if we acknowledge the attitudinal or rational choice model, are courts too institutionally constrained in practice to realize their goals?

Rosenberg, Gerald N. From *The Hollow Hope: Can Courts Bring about Social Change?* University of Chicago Press, 2008. © University of Chicago Press. All rights reserved. This content is excluded from our Creative Commons license. For more information, see <https://ocw.mit.edu/help/faq-fair-use/>.

The Constrained Court View

Even when courts want to act, the “least dangerous branch” is constrained:

1. Reformers must convince the courts that their claims are grounded in constitutional or statutory rights, which are limited
2. Courts are deferential to the federal government and wary of stepping out of the political mainstream
 - *“None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution’s design to leave the selection of the President to the people, through their legislatures, and to the political sphere.”* (Bush v. Gore)
3. Implementation: neither sword nor purse
 - *“John Marshall has made his decision; now let him enforce it!”* (Andrew Jackson)

Conditions for Judicial Activism

1. There is ample legal precedent for change
2. There is support for change among a substantial number of legislators and/or the executive
3. There is either support from some citizens, or at least low opposition from all citizens

Brown v. Board of Education of Topeka (1954)

- Desegregated public schools, overturning the “separate but equal” doctrine in *Plessy v. Ferguson*
- “We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”

Brown v. Board of Education of Topeka (1954)

Condition 1: Precedent had already been chipping away at *Plessy*

- *“In more recent cases, all on the graduate school [347 U.S. 483, 492] level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. Missouri ex rel. Gaines v. Canada, 305 U.S. 337; Sipuel v. Oklahoma, 332 U.S. 631; Sweatt v. Painter, 339 U.S. 629; McLaurin v. Oklahoma State Regents, 339 U.S. 637.”*

Brown v. Board of Education of Topeka (1954)

Condition 2: Support from executive (Eisenhower sending National Guard to Little Rock)



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Condition 3: Public opinion?

“One should never forget the immense moral pressure of such a great judgment as that just announced, and its capacity to persuade men of good will who have been doubting and hesitating.”

(Sutherland 1954)

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17.20 Introduction to the American Political Process
Fall 2020

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